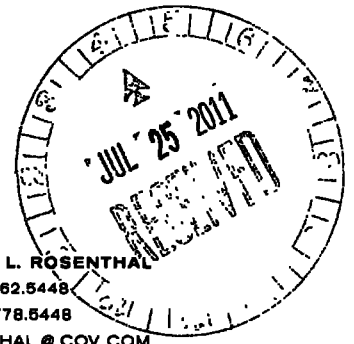


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July 25, 2011

230681

## **BY HAND**

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, SW  
Washington, DC 20423

ENTERED  
Office of Proceedings  
JUL 25 2011  
Part of  
Public Record

Re: Ex Parte No. 705 – Competition in the Railroad Industry

Dear Ms. Brown:

Enclosed for filing *under seal* are an original and ten copies of the HIGHLY CONFIDENTIAL version of Union Pacific's Supplemental Comments. In addition, we have separately enclosed for filing in the Board's *public docket* an original and ten copies of a REDACTED version of Union Pacific's Supplemental Comments.

Additional paper copies of this filing are also enclosed. Please return date-stamped copies to our messenger.

Thank you for your attention to this matter.

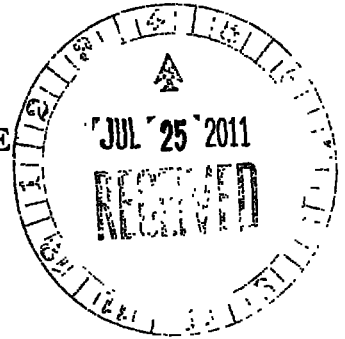
Sincerely,

Michael L. Rosenthal

Enclosures

**REDACTED – TO BE PLACED ON PUBLIC FILE**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**



\_\_\_\_\_  
Ex Parte No. 705  
\_\_\_\_\_

**COMPETITION IN THE RAILROAD INDUSTRY**

\_\_\_\_\_  
**SUPPLEMENTAL COMMENTS OF  
UNION PACIFIC RAILROAD COMPANY**

**ENTERED  
Office of Pro**

**JUL 25 2011**

**Part of  
Public Record**

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July 25, 2011

BEFORE THE  
SURFACE TRANSPORTATION BOARD



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Ex Parte No. 705

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COMPETITION IN THE RAILROAD INDUSTRY

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**SUPPLEMENTAL COMMENTS OF  
UNION PACIFIC RAILROAD COMPANY**

In accordance with the Surface Transportation Board's decision served June 30, 2011, Union Pacific Railroad Company offers these supplemental comments in response to questions raised at the hearing in this proceeding held on June 22, 2011, and June 23, 2011.

In this submission, Union Pacific responds to questions regarding four issues: (1) competition for transportation of coal traffic; (2) competition for transportation of chemical traffic; (3) the use of a "pilot project" to study the impact of forced switching; and (4) possible actions the Board could consider to address issues raised by complaining shippers.

**I. COAL**

At the hearing, the Board asked several witnesses about evidence of competition between Union Pacific and BNSF for transportation of western coal since 2004. *See, e.g., 6/22 Hearing Tr. at 371-72.*<sup>1</sup> Several points merit brief clarification.

*First*, Union Pacific responded in written testimony to claims that Union Pacific and BNSF stopped competing for coal business after 2004 by providing a detailed description of the changing economic and network conditions that have affected coal transportation rates and

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<sup>1</sup> Citations are to the pages of the draft hearing transcript obtained from the reporting service.

several recent examples of competition between Union Pacific and BNSF. *See* UP Reply Comments, Koraleski V.S. at 16-25. Union Pacific’s Chief Executive Officer, Mr. Young, mentioned an additional recent example of coal business that had switched between Union Pacific and BNSF in his oral testimony. *See* 6/22 Hearing Tr. at 299.

At the hearing, Dr. Kenneth Baseman, a witness for Western Coal Traffic League (“WCTL”), answered a question from the Board about competition for coal traffic by claiming that Union Pacific was able to identify only “three or four cases in the last seven or eight years of customer switching.” *See id.* at 373-74. That answer misrepresented Union Pacific’s evidence and reveals significant flaws in Dr. Baseman’s analysis. Union Pacific did not try to identify every example of coal business that switched between Union Pacific and BNSF since 2004. Rather, Union Pacific provided several recent examples to refute claims that there had been *no* switching. However, BNSF’s witness, Mr. Lanigan, testified at the hearing that, since 2004, BNSF won new business or increased its share of traffic to 30 plants and lost business to 21 plants. *See* 6/23 Hearing Tr. at 199.

In addition, any comparison of the number of customers that switched between Union Pacific and BNSF before and after 2004 must account for Union Pacific’s embargo of new coal business from July 2005 to March 2007 to focus its resources on serving existing customers in the wake of the May 2005 Joint Line failure. *See Entergy Arkansas, Inc. & Entergy Servs., Inc. v. Union Pac. R.R. & Missouri & Northern Arkansas R.R.*, Docket No. 42104 (STB served Mar. 15, 2011) at 10. Dr. Baseman ignored this embargo.

*Second*, Dr. Baseman’s answer, and his analysis of the issues raised by WCTL, was also apparently influenced by errors in the written testimony of another WCTL witness, Duane Richards. Mr. Richards’s testimony included a chart with ten examples purporting to

illustrate that “not a single major competitive [coal transportation] account has changed hands [between BNSF and Union Pacific] since 2004.” See Written Testimony of Duane Richards at 6 & Chart VII. However, Mr. Richards’s examples are inaccurate or misleading. Five of the examples involve situations in which traffic actually shifted between carriers since 2004 or remained with Union Pacific because long-term contracts have precluded any shift of business since 2004. Specifically:

- *NRG Texas Power, LLC, Parish plant.* WCTL claims that BNSF handled the traffic to the Parish plant in 2004 and 2010. In fact, Union Pacific {  
}²
- *MidAmerican Energy Co., Walter Scott Jr. Energy Center.* WCTL states that Union Pacific handled the traffic in 2004 and 2010. In fact, Union Pacific {  
}
- *City of San Antonio, Deely plant.* WCTL states that Union Pacific handled the traffic in 2004 and 2010. In fact, Union Pacific {  
}
- *Nebraska Public Power District, Gerald Gentleman plant.* WCTL claims that Union Pacific handled the traffic in 2004 and 2010. In fact, {  
}
- *Public Service Co. of Oklahoma, Northeastern plant.* WCTL states that Union Pacific handled the traffic in 2004 and 2010. In fact, Union Pacific {  
}

---

<sup>2</sup> Text contained within brackets has been designated as Highly Confidential and is redacted from the public version of this document.

The remaining examples also do not support claims that Union Pacific and BNSF are not competing for coal business. With regard to Public Service Company of Colorado's Comanche plant, Union Pacific made a competitive bid for the traffic approximately four years ago, but BNSF won the business. With regard to Southwestern Public Service Company's Harrington plant, Union Pacific believes a long-term contract with BNSF has precluded any opportunity to shift the business since 2004.

With regard to the remaining three examples, Union Pacific retained the business after extensive negotiations with the customers and what we believed to be competitive bidding by BNSF. In fact, two of the three examples {

}

*Third*, Union Pacific responded to claims by AES Corporation that Union Pacific did submit a competitive proposal for business moving to AES's Shady Point plant when AES recently sought bids on a new contract by quoting from AES's communications to Union Pacific. *See* UP Reply Comments, Koraleski V.S. at 24-25. In its written testimony, AES denies having made the quoted statements to Union Pacific. *See* Written Submission by Omaha Public Power District *et al.* at 6. To eliminate any uncertainty, Union Pacific is attaching a copy of the communications hereto as Exhibit A, which prove that AES made the statements it now denies.

## II. CHEMICALS

The Board expressed interest in the question whether the concerns raised by witnesses for chemical shippers involved chemical traffic generally or only the particularly dangerous subset of chemicals classified as “toxic inhalation hazard” materials (“TIH”). *See* 6/22 Hearing Tr. at 459. Several witnesses asserted that their concerns involved chemical traffic generally. *See, e.g., id.* at 461. But in fact, when witnesses provided specific examples to illustrate their concerns, almost all of them involved chlorine or other TIH commodities. *See, e.g.,* 6/23 Hearing Tr. at 139-49 (Olin Corporation); *id.* at 149- 56 (PPG Industries); *id.* at 193 (Arkema, Inc.).

As Union Pacific has recently explained in another pending proceeding, public policy decisions and regulatory actions have distorted the normal functioning of the market for transporting chlorine and other TIH. *See* Submission of Union Pacific Railroad Company, *Canexus Chemicals Canada, L.P. v. BNSF Ry.*, STB Finance Docket No. 35524 (June 15, 2011). In combination, these public policy decisions have created an environment in which railroads are driven to minimize the quantity of TIH they transport, the distance TIH travels over their lines, and the number of lines over which TIH moves, and to drive TIH shipments and their costs to their competitors. *See id.* at 6-7. The ultimate result is that, due to government policies, TIH shipments have become unique in the world of railroading: unlike all other commodities, railroads face considerable disincentives to compete for these shipments. *See id.* at 7.

The Board has the ability to reduce the disincentives involved in transporting TIH by allowing railroads to protect themselves from the extraordinary costs and risks involved with this transportation in two ways. *First*, the Board could apply rate regulation in a manner that

allows railroads to recover the incremental costs of Positive Train Control (“PTC”) that railroads incur under federal legislation and regulation due to the presence of TIH shipments.<sup>3</sup> *Second*, the Board could exercise its regulatory authority over railroad practices and the common carrier obligation in a manner that allows railroads to require TIH shippers to bear a reasonable share of incremental liability related to the unusually dangerous characteristics of their products.<sup>4</sup>

In short, the concerns raised by TIH shippers arise out of a variety of conflicting government policies and Board decisions regarding transportation of TIH, not the Board’s competition rules. Union Pacific continues to urge the Board to work with other federal policymakers to create coherent, consistent policies regarding movements of TIH.<sup>5</sup>

### **III. FORCED SWITCHING “PILOT PROJECTS”**

At the hearing, Mr. Young was asked whether Union Pacific would be interested in participating in a “pilot project” to test the impact of forced reciprocal switching proposals. *See* 6/22 Hearing Tr. at 335. Mr. Young’s response focused on the signals such experiments would send to the financial markets. *See id.* at 336. In response to prior questions, Mr. Young had already addressed other concerns associated with forced switching proposals. He explained

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<sup>3</sup> The Board rejected Union Pacific’s proposal to account for PTC costs in a rate case proceeding in *US Magnesium, L.L.C. v. Union Pacific R.R.*, Docket No. 42114 (STB served Jan. 28, 2010). In Ex Parte No. 681, the Board raised the possibility of adopting adjustments to URCS to better account for the costs of transporting TIH and other hazardous materials, but nothing has happened in that proceeding since February 4, 2009, when comments were filed.

<sup>4</sup> This issue is currently before the Board in *Union Pacific R.R. – Petition for Declaratory Order*, Finance Docket No. 35504 (filed Apr. 27, 2011).

<sup>5</sup> Independent experts have also called for greater coordination of government policies regarding transportation of TIH. An excellent discussion of the issues is contained in Lewis M. Branscomb *et al.*, *Rail Transportation of Toxic Inhalation Hazards: Policy Responses to the Safety and Security Externality*, Belfer Center Discussion Paper #2010-01, Harvard Kennedy School (Feb. 2010), available at <http://belfercenter.ksg.harvard.edu/files/Rail-Transportation-of-Toxic-Inhalation-Hazards-Final.pdf>.



that placing a forced switching approach on the table would discourage investment in terminal facilities, and in particular would cause Union Pacific to revisit its plans to increase substantially its investments in terminals and industry tracks used to handle carload traffic. *See id.* at 317-18. Mr. Young also discussed the difficulties involved in establishing the appropriate compensation terms, *see id.* at 325, as well as Union Pacific's concern for the impact of forced switching on rail operations and efficiencies, *see id.* at 319-20. In addition, although Lance Fritz was unable to attend the hearing, his written testimony addressed in detail the detrimental impact of forced switching on safety, service, and productivity. In sum, Union Pacific believes that the Board should not consider a forced switching "pilot project," at least not before resolving the issue of the appropriate compensation standard and agreeing to protect railroads from any service-related claims and costs related to the test.

#### **IV. POSSIBLE BOARD ACTIONS**

The comments of many complaining shippers in this proceeding made clear that their primary interest in seeking changes to the Board's competitive access rules is to obtain rate relief. Union Pacific believes that, if the Board perceives problems with its rules regarding rate relief, it would be more appropriate to address those issues directly. Specifically, based on the comments made at the hearing, Union Pacific believes the Board could consider changes in two areas. First, the Board could consider raising the limits on relief in Simplified SAC and Three Benchmark cases. This would address specific shipper complaints that the limits are too low and make simplified procedures available for more rates. Second, the Board could consider raising the interest rate that applies to reparations payments. This might help address specific shipper complaints about the rates they must pay while their cases are pending.

**V. CONCLUSION**

Union Pacific appreciates the opportunity to offer these supplemental comments in response to questions raised at the hearing.

Respectfully submitted,

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July 25, 2011

## **EXHIBIT A**

**REDACTED**